No. 82-1605

Office Supreme Court, U.S.
FILED
APR 29 1983
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1982

IN RE: APPEAL OF THERESA McGINNIS

FROM THE DECISION OF THE LANGHORNE MANOR ZONING HEARING BOARD.

On Writ of Certiorari to the Commonwealth Court of Pennsylvania

BRIEF FOR RESPONDENT LANGHORNE MANOR BOROUGH

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QUESTIONS PRESENTED

I. Does the Constitution of the United States require Langhorne Manor Borough to allow petitioner's admittedly commercial and primarily institutional facility consisting of a boarding home or care facility for the elderly to be located in the Borough's most restrictive residential zoning district?

II. Does the Equal Protection Clause of the United States Constitution prohibit Langhorne Manor Borough from permitting foster homes for foster or mentally retarded children in its most restrictive residential zone, while at the same time excluding facilities such as petitioner's which are commercial and primarily institutional?

III. Is the asserted issue regarding the elderly residents of petitioner's home properly before this Court where those residents are not, nor have they ever been, a party to the action, and where such asserted rights have not been properly raised below?

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BRIEF FOR RESPONDENT LANGHORNE MANOR BOROUGH

STATEMENT OF THE CASE

Theresa McGinnis, in her individual capacity, purchased the subject property located at 401 Station Avenue, Langhorne Manor Borough, Pennsylvania, in June of 1979. The property is zoned R-A single family residential, within which district all commercial and institutional uses are prohibited and the primary permitted use is single-family detached dwellings. Despite the foregoing limitation with respect to the permitted uses in the R-A zoning district, Ms. McGinnis has at all times since her purchase of the property used it as a commercial care facility or boarding home for senior citizens. Ms. McGinnis is experienced in such business

operation, having previously maintained an apparently identical operation in Cornwells Heights, Bucks County, Pennsylvania, prior to her purchase of the subject property. The prior business was styled a "Residential Home for Senior Citizens" on stationery which advertised a purpose to "Care for Senior Citizens Daily, Weekly, Week-Ends and Permanent Basis". Many of the persons presently residing with Ms. McGinnis at the subject property, previously were housed by her on the same terms and conditions at her previous business address in Cornwells Heights.

When Ms. McGinnis' use of the property came to the attention of Borough officials, she had residing with her in her home, her uncle and five other unrelated adult individuals. During the course of the proceedings before the Borough Zoning Hearing Board, however, at least one and perhaps two of the residents at Ms. McGinnis' home left and were replaced by other residents. Although Ms. McGinnis was previously a nurse by profession, she does not provide nursing services for the individuals residing with her, all of whom are ambulatory, continent, and for the most part, capable of taking care of their own physical needs.

While Ms. McGinnis never disclosed the nature of her use to the Borough in applications for any use or occupancy permits and refused to cooperate throughout the Zoning Hearing Board proceedings by failing to answer questions attempting to elicit evidence concerning the nature of her enterprise in the Borough, the evidence that was presented clearly establishes that her use is primarily both commercial and institutional, and not familial. The individuals boarding with Ms. McGinnis pay her a fixed monthly or weekly sum in compensation for their room and board. The monies paid, while varying with respect to what they can afford or what the traffic will bear, are not in any way correlated to the boarder's share of expense of maintaining the home. The lower courts all found and Ms. McGinnis concedes that her operation is primarily commercial in nature and the evidence in

the record on this matter, including her business mortgage loan applications and business tax returns, unquestionably establishes this fact. Despite Ms. McGinnis' contentions that she does not hold herself out as running a commercial establishment, the facts are to the contrary. She describes her operation at 401 Station Avenue as a business, styled the "Theresa McGinnis Residential Home" for the purpose of federal income taxation and reported gross income from which she excludes the cost of goods sold, operational expenses and other deductions including typical business deductions for advertising expenses, depreciation, licenses, wages and repairs.

In response to the foregoing situation, the Borough officials sent written notices to Ms. McGinnis advising her with respect to the use regulations in the R-A zoning district and requesting her to cease and desist from the aforesaid use of the property. Not only did Ms. McGinnis ignore these notices, but she also denied ever having any knowledge of same during her testimony before the Zoning Hearing Board. As a result of this situation, on October 10, 1979, the Borough Zoning Officer cited Ms. McGinnis for failure to comply with the use regulations in the R-A district. She appealed from the issuance of this citation to the Borough Zoning Hearing Board, and, at the same time, requested a variance from the use regulations of the R-A district or, in the alternative, a determination that the Borough Zoning Ordinance is unconstitutional in general or invalid as applied to her property. During extensive hearings before the Zoning Hearing Board, the Borough established that petitioner's use was primarily commercial and institutional, and that it was not equivalent to that of a nuclear family.

The record shows that the home is owned by Ms. McGinnis individually and is used for the same purpose and in the same business manner as her previous property at 1676 Hulmeville Road, Cornwells Heights, Pennsylvania, which Ms. McGinnis referred

to and advertised as a "Residential Home for Senior Citizens". Ms. McGinnis, in her testimony, went to great lengths to explain that she was not operating a nursing home or other type of state-recognized facility for the care of the elderly.[1] The individuals boarding with Ms. McGinnis are all ambulatory, continent, and basically capable of taking care of their own physical needs. They all dress and feed themselves, are free to come and go as they like, including for automobile rides, and with respect to the ladies, to the hairdressers. Some of the individuals also appear to help in preparing food and doing other tasks or chores around the household although this seems to be more by choice of the individual boarder than by any firm agreement with Ms. McGinnis. While Ms. McGinnis has a B.S. and M.A. in nursing, she concedes that the relationship with her boarders is not that of nurse and patient, and that she does not provide any nursing services whatsoever for the individuals who rent rooms from her. At most, she may help some of the individuals with diet or the taking of medication if that is necessary. The record is also clear that the boarders do not share in the duties or expenses of maintaining a common household. Instead, they pay Ms. McGinnis a fixed monthly or weekly sum in compensation for the room and board provided for them. The money paid by each boarder, while possibly varying to take into account what the traffic would bear, is not in any way correlated to each boarder's share of the expenses of maintaining the home. In fact, the charge for the boarders does not vary depending upon how many residents are in the home, but remains constant. In addition, and probably of most significance, Ms. McGinnis in her mortgage application for the

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1. Clearly, a nursing home or other similar facility which is regulated under the auspices of the Commonwealth of Pennsylvania would not be permitted in the R-A residential district as the equivalent of a single-family dwelling. Such a use would, however, be permitted as of right in the institutional and R-C zoning districts within the Borough.

instant property and in her federal income tax return acknowledges that she is in the business of maintaining a residence for senior citizens. In her mortgage application, she estimated her monthly income from the business at $1,000. In her federal income tax return, Schedule C, she lists all of the monies paid by her boarders as business income and takes all of the standard business deductions available including deductions for mortgage interest, advertising and depreciation of the real estate and personal property. Also, we note that Ms. McGinnis employs a bookkeeper and C.P.A. to maintain the books and records of the business.

In response to the foregoing evidence establishing the primarily commercial nature of the use and the non-familial nature of the use, Ms. McGinnis not only failed to present contrary evidence, but she persistently refused to cooperate with the fact finding tribunal by refusing to divulge necessary information properly requested, as recognized by the Commonwealth Court of Pennsylvania in footnote 3 of their opinion.

After the close of the hearings before the Zoning Hearing Board, the Board rendered comprehensive finding of fact, conclusions of law, and a decision upholding the cease and desist order and denying and dismissing the appeal of Ms. McGinnis therefrom.

Ms. McGinnis appealed the Zoning Hearing Board's decision to the Court of Common Pleas of Bucks County, Pennsylvania. That County Court upheld the Zoning Hearing Board's decision in part, concluding that Ms. McGinnis' use was not permitted of right, nor was she entitled to a variance. The County Court, however, concluded that the Langhorne Manor Borough Zoning Ordinance was unconstitutional as applied to Ms. McGinnis' proposed use. From this decision, both parties appealed to the Commonwealth Court of Pennsylvania, which court in a unanimous opinion by a three judge panel, reversed the opinion

of the County Court below and upheld the constitutionality of the Borough Zoning Ordinance. Thereafter, petitioner filed a petition for allowance of appeal with the Pennsylvania Supreme Court and on December 28, 1982 the petition was denied. This appeal followed.

ARGUMENT

I.

The Constitution of the United States does not require Langhorne Manor Borough to allow petitioner's admittedly commercial and primarily institutional facility consisting of a boarding home or care facility for the elderly to be located in the Borough's most restrictive residential zoning district.

Langhorne Manor Borough, like most municipalities within the United States, has elected to limit its most restrictive zoning district primarily to single-family dwellings. The ordinance defines "Family" as follows:

> "One or more persons related by blood, marriage or adoption, and in addition, any domestic servants or gratuitous guests thereof; or a group of not more than five persons who need not be so related, and in addition, domestic servants or gratuitous guests thereof, who are living together in a single non-profit dwelling unit and maintaining a common household with single cooking facilities. A roomer, boarder or lodger shall not be considered a member of the family."

In so doing, the Borough has excluded all commercial and institutional uses from this R-A zoning district. Such a limitation to single-family dwellings has been recognized throughout the

history of zoning as legitimately preserving family needs and values and has been court approved by all jurisdictions, including the United States Supreme Court. In the landmark United States Supreme Court decision in the case of *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974), Justice Douglas stated:

> "A quiet place where yards are wide, people are few and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within Berman vs. Parker, supra. The police power is not confined to a elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values and the blessings of quiet seclusion and clean air make the area a sanctuary for people." (U.S. page 9).

The *Belle Terre* case involved a constitutional challenge to the zoning ordinance of a small residential community in Long Island, New York, which is similar to Langhorne Manor Borough in many respects.[2] The Belle Terre Zoning Ordinance which was the subject of the challenge was, however, more restrictive than the ordinance of Langhorne Manor Borough. The Belle Terre ordinance defined the "family" as:

> "One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants.

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2. Langhorne Manor Borough is a small, predominately residential area, measuring less than one mile in length, containing .65 square miles and having a population of approximately 1200 persons. Seventeen percent (17%) of the area of the Borough is zoned institutional, in which area Ms. McGinnis' use is permitted as of right.

> A number of persons but not exceeding two living and cooking together as a single housekeeping unit though not related by blood, adoption or marriage."

The Supreme Court, per Justice Douglas, held that this ordinance was constitutional and that the town could properly prevent six unrelated adult individuals who were fraternity brothers from living together in a single-family residential unit.

Since the *Belle Terre* decision, the courts in this country have continued to recognize that the preservation of family needs and values are a legitimate zoning purpose, and have uniformly upheld the constitutionality of limiting zoning districts to single-family residential use. What the courts have struggled with has been the extent to which a municipality can constitutionally limit the definition of "family", and, thereby, exclude extended families or unrelated individuals from living together. For instance, in *Moore v. City of East Cleveland,* 413 U.S. 494 (1977), the Supreme Court held that it was unconstitutional to define family so narrowly as to prevent a grandmother from living with her two grandsons.

In the instant case, petitioner argues that the *Belle Terre* and *Moore* decisions should be expanded to provide federal constitutional protection to groups of unrelated individuals who wish to reside together in single-family zoning districts. Petitioner cites cases from several state jurisdictions, including the Commonwealth of Pennsylvania, which have either through state statutory provisions or through interpretation of state constitutional provisions, afforded unrelated individuals the right to live together in single-family zoning districts in certain limited situations. For instance, the cases of *State v. Baker,* 81 N.J. 99, 405 A. 2d 638 (1979) and *White Plains v. Ferraioli,* 357 N.Y.S. 2d 449, 313 N.E. 2d 756 (New York 1974), involved exclusions of unmarried couples living together as a family. Others such as

Holy Name Hospital v. Montroy, 379 A. 2d 299 (N.J. 1977) and *Missionaries of Our Lady of LaSallette v. White Fish Bay*, 66 N.W. 2d 627 (Wisconsin 1954), involved exclusions of religious orders. Likewise, the Courts of Pennsylvania have recognized certain limited circumstances in which unrelated individuals may not be prohibited from residing together. In *Children's Home of Easton v. City of Easton*, 53 Pa. Cmwlth. Ct. 216, 417 A. 2d 830 (1980) and *Hopkins v. Zoning Hearing Board of Abington Township*, ____Cmwlth. Ct.____, 423 A. 2d 1082 (1980), the Courts of Pennsylvania have held that a municipality may not preclude an existing biological family from taking in a limited number of foster children, nor may a municipality preclude a non-profit corporation from occupying a single-family dwelling in which it housed adult houseparents acting in loco parenatis for three mentally retarded children who permanently resided with them in the house. The rationale behind all of the foregoing cases is that there must be a rational relationship between the restrictions contained in the local municipal ordinance and the governmental interest in preserving the residential character of the neighborhood, so as to permit within these districts unrelated persons to live together in circumstances where their living arrangement is the functional equivalent of a biologically related family.

While our research has not disclosed any federal court decisions which have upheld, on constitutional grounds, the right of unrelated persons to live together in a single-family zoning district even in the limited circumstances involved in the foregoing State cases, the issue as to whether unmarried individuals, foster families, or other groups equivalent to the biological family have a constitutional right to live in a single-family zoning district is not the issue that is before the court in the instant petition. Under the terms of the Langhorne Manor Borough Zoning Ordinance, all of the foregoing uses would be permitted in the R-A zoning district as a matter of right. The Langhorne Manor Borough Zoning Ordinance defines families so as to include, with an outside

number limit, the right of unrelated individuals to reside together as long as they live in a non-profit environment and maintain a common household, *i.e.*, where the arrangement is the functional equivalent of a biologically related family such as a foster home or similar use.

What the petitioner is really requesting in the instant petition is for this Court to establish completely new constitutional doctrine and hold that the federal constitution affords unrelated individuals the right to live together in single-family zoning districts even where the nature of their use is primarily commercial or institutional. It is submitted that no case in any jurisdiction, either state or federal, has ever even hinted that the federal constitution affords such a right. Many of the cases dealing with the issue as to the constitutional limitations on the right of unrelated persons to live together in single-family zoning districts are collected in an annotation found at 71 A.L.R. 3d 693 (1976). None of the cases in this annotation, and the supplement thereto, however, come close to supporting the position of petitioner herein. Where the use in question has not been held to be the functional equivalent of a biologically related family, but, on the contrary, is primarily commercial or institutional, as in the case herein, the courts of all of the jurisdictions to address such an issue have uniformly held that such uses are not entitled to constitutional protection. *See Pennsylvania George Junior Republic v. Zoning Hearing Board of Cool Springs Township*, 27 Pa. Cmwlth. Ct. 151, 389 A. 2d 261 (1978) and *Wengert v. Zoning Hearing Board of Upper Merion*, 51 Pa. Cmwlth. Ct. 79, 414 A. 2d 148 (1980).

The cases which petitioner cites in support of her argument, especially those which it is suggested afford constitutional protection to living arrangements which are primarily commercial in nature, do not, even on superficial analysis, stand for the propositions for which petitioner cites them.

The case upon which petitioner primarily relies, *Costley v. Caromin House,* ____Minn.____, 313 N.W. 2d 21 (Minn. 1981) was not decided on constitutional grounds, either state or federal. On the contrary, the holding of the case was that the retarded individuals involved were permitted to reside within the single-family zoning district of the city in question as a matter of right under the terms of the city's ordinance. The city ordinance in question, unlike the ordinance in Langhorne Manor Borough, did not restrict the definition of family to non-profit dwelling units so the court held that the use in question, despite its arguably commercial nature, came within the ordinance definition of family and could not, therefore, be prohibited as a matter of statutory construction. In addition, it should be pointed out that Minnesota has enacted a state statute[3] which prohibits a municipality from excluding groups of mentally retarded or physically handicapped persons from residing together in residential zoning districts as long as they live in state licensed group or foster homes, serving six or fewer individuals. The state statute mandates that such uses be considered as permitted single-family residential uses for purposes of zoning within the State of Minnesota. Further, in *Costley, supra,* the use in question was a state licensed group home which had obtained a certificate of need from the Minnesota Department of Health, and location approval from the Minnesota Department of Public Welfare. As such, it would appear clear that an alternative ground for the relief granted by the court would be state pre-emption of the local municipal zoning regulations. In the case at bar, Ms. McGinnis' use is not in any way sanctioned by the state and is not part of the Commonwealth fostered programs for the placement of foster or mentally retarded children in residential environments.

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3. Minn. Stat. §462.357, subd. 7 (1980).

The other case relied upon by petitioner, *Crowley v. Knapp*, 288 N.W. 2d 815 (Wisc. 1980), does not even involve issues of zoning. On the contrary, it merely involved the interpretation of a deed restriction.

For the foregoing reasons, it is submitted that the instant petition does not present any special or important reasons for the grant of certiorari. It does not involve a situation where federal or state court decisions are in conflict, nor, we submit, does it involve an important question of federal law which has not been settled. On the contrary, uses which are primarily institutional or commercial have, as the very basis for zoning, traditionally been excluded from residential zones. As such, the petition for certiorari in this case should, we submit, be denied.

II.

The Equal Protection Clause of the United States Constitution does not prohibit Langhorne Manor Borough from permitting foster homes for foster or mentally retarded children in its most restrictive residential zone, while at the same time excluding facilities such as petitioner's which are commercial and primarily institutional.

In order to succeed with her equal protection argument, petitioner must establish that the distinctions made by Langhorne Manor Borough and the Courts of Pennsylvania in these type of cases bear no rational relationship to the legitimate legislative purpose of the municipality in preserving residential values in an R-1 residential zone. This standard of review in equal protection cases known as the "Rational Basis" test has uniformly been applied in evaluating equal protection challenges both in the United States Supreme Court and in various state courts. *New Orleans v. Dukes*, 427 U.S. 297, 96 S. Ct. 2513, 49 L. Ed. 29 511 (1976); *Tosto v. Pennsylvania Nursing Home Loan Agency*, 460 Pa. 1,

331 A. 2d 198 (1975); *Baltimore & Ohio Railroad Co. v. Commonwealth of Pennsylvania, Department of Labor & Industry,* 461 Pa. 68, 334 A. 2d 636 (1975).

Analyzing the situation in light of this standard, we submit that the Borough Zoning Ordinance and the Pennsylvania Court's holding in this case is clearly consistent with the constitutional requirements of equal protection. The opinion of the Commonwealth Court of Pennsylvania makes reference to numerous distinctions between McGinnis' use and those which have previously been permitted in residential zones, any one of which distinctions is reasonably related to the purpose of preserving residential values and is, therefore, sufficient to meet any challenge on the basis of equal protection. The Pennsylvania Court in its opinion recognized two clear distinctions between petitioner's use and the uses involved in *Children's Home of Easton v. City of Easton,* ____Pa. Cmwlth. Ct.____, 417 A. 2d 830 (1980); and *Hopkins v. Zoning Hearing Board of Abington Township,* ____Pa. Cmwlth. Ct.____, 423 A. 2d 1083 (1980), which petitioner attempts to analogize to her situation, both of which distinctions are clearly related to a preservation of residential values. First of all, the Pennsylvania Court recognized that petitioner's use is primarily commercial, while those involved in the cited cases are not. Secondly, the Pennsylvania Court recognized that petitioner's use is not the functional equivalent of a biological family, while the use involved in *Children's Home of Easton* and *Hopkins* were clearly the equivalent of what one would expect in a residential neighborhood.

Turning to the first distinction referred to by the Pennsylvania Commonwealth Court, the undisputed facts are that what Ms. McGinnis is operating is primarily a business or commercial operation. While the nature of the business is that of a boarding home which, to date, has been limited to senior citizens, this does not make her use any the less commercial. The Borough Zoning

Hearing Board held, which holding was found by the Pennsylvania Appellate Courts to have been supported by substantial evidence, that the boarders do not share in the duties or expenses of maintaining the common household. Instead, they pay Ms. McGinnis a fixed monthly or weekly sum in compensation for the room and board provided them. The money paid by each boarder, while possibly varying to take into account what the traffic would bear, is not in any way correlated to each boarder's share of the expenses of maintaining the home. In fact, the charge for the boarders does not vary depending upon how many residents are in the home but remains constant. In addition, and probably of most significance, Ms. McGinnis in her mortgage application for the instant property and in her federal income tax return acknowledges that she is in the business of maintaining a residence for senior citizens. In her mortgage application, she estimated her monthly income from the business at $1,000. In her federal income tax return, Schedule C, she lists all of the standard business deductions available including deductions for mortgage interest, advertising and depreciation of the real estate and personal property.

Ms. McGinnis does not dispute that her use is primarily business or commercial. In her statement of the case before the Pennsylvania Court she stated:

> "The residential home is not being operated as non-profit; Ms. McGinnis receives compensation for the operation of the home and spends all of her time there."

Given the fact that Ms. McGinnis' operation is primarily that of a commercial use, it appears self-evident, as the Commonwealth Court recognized, that such a use can constitutionally be excluded from Langhorne Manor Borough's most restrictive residential district, and can only be permitted within the Borough's

institutional or commercial district. The basic foundation of zoning principles is premised upon such differences in use and is sufficient to justify the exclusion of Ms. McGinnis' use from the residential district without any need to go into an analysis of the *Belle Terre* case or its progeny regarding the definition of family. Ms. McGinnis' argument to the contrary, that the prohibition of her use depends upon a determination that the proposed commercial use would endanger the public health, safety or morals of those living in the residential district, is an incorrect statement of the law and is contrary to one of the basic principles behind the law of zoning and the establishment of residential districts by means of zoning, the constitutional validity of which was affirmed by this Court in the *Belle Terre* case. As this Supreme Court, as well as the Supreme Court of Pennsylvania, has recognized, a prohibition of Ms. McGinnis' use in a residential zoning district does not depend upon a determination that the proposed commercial use would endanger the public health, safety and welfare. *Euclid v. Ambler Realty Company,* 272 U.S. 365 (1926); *Swade v. Springfield Township Zoning Board of Adjustment,* 392 Pa. 269 (1978). As the Pennsylvania Supreme Court stated in *Swade, supra,* page 270 and 271:

> "We cannot agree with either of these contentions. The very essence of zoning is a designation of certain areas for different purposes. Business may not encroach on residential areas except through the medium of a special exception of variance. The conditions under which a variance can be granted are fully set forth in the Springfield Zoning Ordinance and the Enabling Act.
>
> If the Appellant's first contention is law, then the whole plan and scheme of zoning must be cast aside because business and industry could invade any zone just so long as it could be shown that the

> proposed use would not adversely affect to any reasonable extent the public health, safety or morals. The statutory law of zoning would be replaced by the law of nuisance." (*Swade*, pages 270 and 271).

Ms. McGinnis' reliance upon the Pennsylvania Commonwealth Court cases of *Children's Home of Easton, supra,* and *Hopkins, supra,* to support her argument that her commercial use is permitted in a residential zone is, we submit, clearly misplaced and ignores a fundamental element of the rationale behind these cases in failing to distinguish between a primarily commercial use and a use which is primarily non-profit and residential in nature. Unlike the present case, both *Hopkins* and *Children's Home of Easton* involve uses conducted under the auspices of the Commonwealth of Pennsylvania, which were clearly of a primarily non-profit nature. In *Children's Home of Easton,* an existing biological family with two (2) natural children proposed to take in three (3) foster children. While they were to be compensated to some extent for their care of the foster children, there can be no doubt that their primary use of the property was not for business purposes, but was for residential purposes. Likewise, in *Hopkins,* a non-profit corporation occupied a single-family dwelling in which it proposed to house two (2) adult individuals acting as house parents for three (3) mentally retarded children. Inherent in the Pennsylvania Commonwealth Court's decision in both of these cases to the effect that these circumstances were the functional equivalent of the biological family and could not, therefore, constitutionally be excluded from residential zoning districts, is the basic premise that these uses are primarily non-profit, and not commercial or business. Certainly if the primary aspect of the use was commercial, it cannot, at the same time, be the functional equivalent of a biological family with its interests in preserving familial values. As such, Ms. McGinnis' argument in this case ignores and overlooks substantial

distinctions between her situation and those given protection under Pennsylvania constitutional doctrines in the case of *Children's Home of Easton, supra,* and *Hopkins, supra.*

The Pennsylvania Court in its opinion below, recognized not only that Ms. McGinnis' use could constitutionally be excluded because of its primarily commercial nature, but also that it could be excluded because Ms. McGinnis' boarders do not maintain a common household, nor are they the functional equivalent of a biological family, as was the case in *Children's Home of Easton, supra,* and *Hopkins, supra.* On the contrary, Ms. McGinnis' use is primarily institutional. In particular, Ms. McGinnis' use does not involve a situation where unrelated foster or mentally retarded children are living with an existing family consisting of mother and father, and possibly other natural children, in an environment equivalent to that of a biological family. In this case, the residents are all adult individuals who are, by Ms. McGinnis' own admission, basically capable of taking care of themselves. They live with her out of convenience and not out of any substitute for a parent-child or other familiar relationship. These individuals, unlike family members, do not share in the duties or expenses of maintaining a common household. Instead, as do any other boarders, they pay Ms. McGinnis a fixed monthly or weekly sum in compensation for the room and board provided them. The monies paid, while varying with respect to individuals on the basis of what they can afford or what the traffic will bear, are not in any way correlated to each boarder's share of the expense of maintaining the home. In fact, the charge for the boarders does not vary depending upon how many there are in the home, but remains constant. The mere fact that some of the boarders gratuitously help out with chores, have free run of most of the house, and have feelings toward one another, does not, as Ms. McGinnis suggests, make these individuals any less boarders, and somehow convert them magically into something analogous to a family. Furthermore, as the Pennsylvania Commonwealth Court

recognized there are other distinctions between petitioner's use and those sanctioned by the Pennsylvania courts in the *Hopkins* and *Children's Home of Easton* cases, including the transient nature of the residence of Ms. McGinnis' boarders, and the similarity of her use to that of an institutional facility. The record supports the fact that most of Ms. McGinnis' boarders live with her out of convenience pending relocation with family members or institutionalization. As the Pennsylvania Commonwealth Court stated:

> "The record here reveals that during the course of the hearings before the board at least one and perhaps two of the residents at Ms. McGinnis' home had gone elsewhere. Each resident is free to leave at any time unfettered by the legal, social and moral bonds — including those bonds created, for example, by a commitment to the task of child rearing — that import greater stability to nuclear families. In sum, each of these cases must turn on its facts and with the exception of the age of the residents, the living arrangement here involved is very much like that of *Belle Terre* and unlikely to be mistaken for a nuclear family."

In light of the foregoing, we submit that there is clearly a rational basis for distinguishing between Ms. McGinnis' use and those uses in *Hopkins* and *Easton Home*. Unlike petitioner's proposed use, these latter uses involve foster or mentally retarded children living with an adult couple in a domestic environment intentionally structured under the auspices of agencies of a state so as to mirror a traditional nuclear family. Petitioner's use, on the contrary, as the Pennsylvania courts noted, is much more akin to the situation found in *Belle Terre*,

supra, which this Court held could constitutionally be excluded from a residential zone.

While petitioner argues that the holding of the Pennsylvania Court prohibits a valuable service to the community and will result in confining the elderly to institutional care, this argument not only begs the question, but is incorrect. As petitioner concedes, seventeen percent (17%) of the land in Langhorne Manor Borough is zoned so as to permit Ms. McGinnis' use. The Borough, consistent with the legitimate purpose of zoning, does not prohibit Ms. McGinnis' use, but merely requires that it be located in a certain district within the Borough. As such, the exclusion of Ms. McGinnis' use from the most restrictive residential zone creates no more of a hardship upon her and her boarders than does the exclusion from that zone of those people who desire to reside in apartments or mobile home parks. As long as reasonable space has been provided for such a use, the Borough ordinance cannot be subject to constitutional challenge.

III.

The asserted issue regarding the elderly residents of petitioner's home is not properly before this Court where those residents are not, nor have they ever been, a party to the action, and where such asserted rights have not been properly raised below.

It should initially be pointed out that the residents of the McGinnis home, although they were afforded the opportunity to become parties before the Borough Zoning Hearing Board, did not choose to do so and are not now parties to the present action, nor were they ever parties before any of the proceedings before the Borough Zoning Hearing Board, the Local Pennsylvania Common Pleas Court, or the Pennsylvania Commonwealth Court. The only parties to this action, and, therefore, the only parties having standing to raise argument, are petitioner Theresa

McGinnis, the Langhorne Manor Borough Zoning Hearing Board and respondent herein, Langhorne Manor Borough. As such, the law is clear that the residents have no standing in this proceeding to assert any purported constitutional right. Furthermore, no question or issue with respect to the constitutional rights of Ms. McGinnis' customers were ever raised below and, as such, no federal question was timely or properly raised below and this Court does not have jurisdiction to review, on writ of certiorari, any allegations with respect to a deprivation of the rights of the customers of Ms. McGinnis.[4] Supreme Court Rule of Procedure 2l(1)(h).

Furthermore, even if this novel issue is addressed, it appears clear beyond argument that due process requires no further proceedings than have been afforded in this case. Any of the residents of the home had the opportunity to intervene in this proceeding before the Zoning Hearing Board, or subsequently, at any stage of the proceedings to the extent that they were aggrieved parties or parties in interest under the terms of the Pennsylvania Municipalities Planning Code, the state statute governing zoning appeals. As such, the residents of the home were actually afforded the opportunity to become parties to a hearing wherein they could assert any rights necessary to protect their interest. The opportunity for participation in such a hearing certainly complies with any due process rights that these elderly residents have, and they cannot now complain about a lack of due process where they failed to take the opportunity afforded them in the first place.

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4. The only issues raised in argument before the Court of Common Pleas of Bucks County and the Pennsylvania Commonwealth Court were that the constitutional rights of the petitioner, Theresa McGinnis, as the property owner, were being violated.

Finally, it should be pointed out that this situation is far different than those cited in support of petitioner's argument which involved the transfer of patients subject to the jurisdiction of a federal agency. The case at bar merely involves a zoning appeal and, therefore, the precedents cited by petitioner are totally inapplicable.

CONCLUSION

The Langhorne Manor Borough Zoning Ordinance, the validity of which has been upheld by the Appellate Courts of Pennsylvania, permits as of right, with an outside number limit, unrelated individuals to reside together as long as they live in a non-profit environment and maintain a common household, *i.e.*, where the arrangement is the functional equivalent of a biologically related family such as a foster home or similar situation.

Petitioner in this case suggests that this Court should invalidate the aforesaid ordinance on federal constitutional grounds since it does not afford unrelated individuals the right to live together in the Borough's most restrictive residential zoning district where the nature of such use is primarily commercial or institutional. In support of its position, petitioner cites no case in any jurisdiction either state or federal, which has even suggested that the federal constitution affords such a right. As such, it is submitted that the instant petition does not present any special or important issues of federal law, nor does it involve an issue upon which federal or state court decisions are in conflict. As such, grant of certiorari should be denied.

Respectfully submitted,

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